

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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GUISELA AGUIRRE GUERRA,

Plaintiff,

v.

DEMATIC CORP., *et al.*,

Defendant.

Case No. 3:18-cv-00376-LRH-CBC

ORDER

DEMATIC CORP., a Delaware Corporation,

Third-Party Plaintiff,

v.

SALLY BEAUTY SUPPLY, LLC F/K/A
SALLY BEAUTY COMPANY, INC.,

Third-Party Defendant.

Before the Court are plaintiff Guisela Aguirre Guerra's ("Guerra") objections to Magistrate Judge Baldwin's ("Judge Baldwin") orders resolving various discovery disputes between Guerra and third-party defendant Dematic Corp. ("Dematic). Namely, Guerra objects to Judge Baldwin's orders granting Dematic's motion to strike expert testimony and denying aspects of Guerra's motions to compel evidence and for sanctions (ECF Nos. 144, 151). Dematic filed responses to each objection (ECF Nos. 153, 156). For the reasons articulated below, the Court overrules each of Guerra's objections.

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1 **I. BACKGROUND**

2 This matter involves a personal injury lawsuit arising out of a warehouse injury. On July
 3 11, 2018, Guerra filed a complaint against Dematic in state court alleging that it negligently
 4 caused, and is strictly liable for, an injury Guerra obtained while working for Sally Beauty
 5 Supply, LLC (“Sally Beauty”). ECF No. 1-1. Specifically, Guerra alleges that a lift gate—
 6 manufactured and installed by Dematic’s predecessor—which allows the user to pass through a
 7 portion of the conveyor belt system in Sally Beauty’s warehouse, injured Guerra’s right arm on
 8 June 15, 2016. ECF No. 1-1 at 5–6. Dematic removed the case to this Court on August 8, 2018,
 9 pursuant to 28 U.S.C. § 1441. ECF No. 1. On January 24, 2019, Dematic filed a third-party
 10 complaint against Sally Beauty alleging that, based on an express indemnity provision contained
 11 in a 1999 agreement to install the Gate, Sally Beauty is liable for Guerra’s injuries because it
 12 allegedly made modifications to the conveyor system’s safety features. *See* ECF No. 20. After
 13 completing discovery on February 28, 2022, the parties filed dispositive motions and made
 14 objections to Judge Baldwin’s orders related to discovery. The objections form the basis of this
 15 Order.

16 **A. Discovery Disputes**

17 Guerra filed three objections to orders by Judge Baldwin that resolved discovery disputes
 18 between Guerra and Dematic. The first concerned issues related to a supplemental expert report
 19 submitted by Guerra’s expert Dr. Bantum, the second concerned Guerra’s request for Dematic’s
 20 employment advertisements between 1998-2000, and the third concerned Guerra’s request for
 21 electronic stored information (“ESI”) related to Dematic’s gate models and associated injuries.
 22 The Court will recount each of those discovery disputes below.

23 1. Dr. Bantum’s Supplemental Expert Report

24 After numerous discovery deadline extensions, on August 20, 2021, the parties filed a
 25 joint notice of a discovery dispute. ECF No. 100. Dematic requested to continue discovery due to
 26 Guerra newly disclosing a left shoulder injury that occurred on May 27, 2021. *Id.* Dematic
 27 claimed it would be prejudiced because the new left shoulder injury prevented it from conducting
 28 a full functional capacity evaluation to test the validity of Guerra’s expert witness Rhonda

1 Fiorillo's ("Fiorillo") original July 2, 2018 functional capacity evaluation and report. *Id.* Guerra
2 opposed the continuance. *Id.* Guerra maintained that the new injury to her left arm was
3 foreseeable given the nature of her original right arm injury and her continued employment at a
4 capacity beyond the sedentary level recommended in Fiorillo's 2018 report. *Id.* The parties did
5 not dispute that the "parties' experts can supplement their reports to take [Guerra's] new left
6 shoulder injury into account to give opinions as to whether it is related to or caused by [Guerra's]
7 original right arm injury." *Id.* Judge Baldwin eventually extended discovery for the limited
8 purpose of completing expert and witness depositions by February 28, 2022 but did not abrogate
9 the original scheduling order deadline of August 13, 2021 for initial expert reports. ECF No. 140
10 at 2.

11 After the completion of discovery on February 28, 2022, Dematic filed a motion to strike
12 a "supplemental" expert report submitted by Guerra's expert Dr. Bantum. ECF No. 117. Dr.
13 Bantum concluded that the original incident on June 15, 2016 caused the left shoulder injury that
14 occurred on May 27, 2021. ECF No. 117-2 at 13–16.¹ In its motion to strike, Dematic asserted
15 that there was an unjustifiable delay of 88 days between when Guerra was required to disclose
16 Dr. Bantum's expert report (August 13, 2021), and when Guerra actually disclosed the expert
17 report to Dematic (November 9, 2021). ECF No. 117. Guerra, in her opposition to the motion to
18 strike, maintained that the parties agreed in their August 20, 2021 joint notice of discovery
19 dispute that the parties' experts could supplement their expert reports to consider Guerra's new
20 left shoulder injury. ECF No. 125.

21 Judge Baldwin granted the motion to strike Dr. Bantum's expert report. ECF No. 140.
22 Judge Baldwin found that the report "contained all new causation opinions related to Guerra's
23 new injury," as his opinions "did not address errors or new information but instead sought to add
24 information that should have been included in an initial report." *Id.* at 5 (emphasis in original).
25 Judge Baldwin further found that all but some of the documents Dr. Bantum reviewed for his
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28 ¹ Dematic also sought to strike a supplemental expert report dated February 5, 2022 from Dr. Bantum where he reviewed Guerra's medical records from August 25, 2005, to January 19, 2022 as well as an addendum to the supplemental report. ECF No. 121-1 at 16–22; ECF No. 123.

1 supplemental report were available before the August 13, 2021 initial expert report deadline.² *Id.*
 2 Therefore, according to Judge Baldwin, “[t]o allow free ‘supplementation’ would ‘circumvent
 3 the full disclosure requirement implicit in Rule 26...’” *Id.* (citing *Beller ex rel. Beller v. United*
 4 *States*, 221 F.R.D. 689, 695 (D.N.M. 2003)).

5 2. Employment Advertisements

6 On February 8, 2022, Guerra filed a motion to compel arguing that Dematic agreed to
 7 provide certain responses to requests for production but had failed to do so at the time of the
 8 filing of the motion. ECF No. 118. Specifically, the motion to compel sought documentation
 9 sufficient to show the current cost of the springs on Dematic’s other conveyor gate models, as
 10 well as any record of advertisements for employment at Dematic’s warehouses from 1998-2000
 11 that may include a description of physical demands for the job to lift material weighing up to 50
 12 lbs. ECF No. 141 at 4–5. Dematic opposed the motion asserting that the requests were not
 13 relevant as they concerned gate models not at issue in the case, as well as the fact that neither
 14 request proved any element of Guerra’s claims. *See* ECF No. 127.

15 Judge Baldwin denied Guerra’s motion to compel. ECF No. 141 at 5. Citing the Federal
 16 Rules of Civil Procedure, Judge Baldwin reminded Guerra that “discovery is ordinarily allowed
 17 under the concept of relevancy unless the information sought has no bearing on the claims and
 18 defenses of the parties.” *Id.* To that end, Judge Baldwin found that “Guerra has not shown how
 19 discovery related to gates different from the gate at issue in the case is relevant to her strict
 20 liability or negligence claims, where both claims relate specifically to the Model 300 gate.” *Id.*

21 3. ESI Discovery

22 On February 9, 2022, Guerra also filed a motion for sanctions, or in the alternative, a
 23 motion to compel for “Dematic’s failure to comply with [Judge Baldwin’s] order directing the
 24 parties to cooperate as to ESI discovery.”³ ECF No. 122 at 8. The ESI discovery concerned

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 26 ² Specifically, Dr. Bantum reviewed: (1) Guerra’s September 24, 2020 and October 2, 2020 depositions; (2)
 27 Guerra’s June 1, 2021 reporting of the May 27, 2021 injury; (3) Dr. Jarvis’s treatment records, dated June 1, 2021
 through June 10, 2021; (4) MRI, dated July 30, 2021; and (5) Dr. Dobb’s treatment records, dated August 30, 2021,
 28 September 27, 2021, and October 25, 2021. ECF No. 140 at 6. Dr. Dobb’s treatment records were the only
 documents not available before the August 13, 2021 initial expert report deadline. *Id.*

³ Guerra was referencing Judge Baldwin’s August 4, 2020 order that directed the parties to meet and confer to
 discuss ESI and whether it is necessary to modify the discovery plan and scheduling order in any way. ECF No. 72.

1 information about gate models and the weight of gate models within both Dematic's SalesForce
 2 and Microsoft 365 databases. *See id.* at 4. The Microsoft 365 database formed the basis of the
 3 motion for sanctions. *Id.* Dematic opposed the motion maintaining that it had not failed to
 4 comply with ESI discovery, but rather, the ESI searches requested by Guerra resulted in over
 5 46,000 results on information pertaining to numerous gates designed by Dematic. ECF No. 129.
 6 Based on those results, Dematic argued that Guerra was on an ESI discovery "fishing
 7 expedition." *Id.* at 8. Judge Baldwin denied Guerra's motion for sanctions, or in the alternative, a
 8 motion to compel finding that "information about gates different from the subject gate is
 9 irrelevant to the claims and defenses in this case. Dematic is not required to produce irrelevant
 10 information." ECF No. 141 at 6.

11 **II. LEGAL STANDARD**

12 A magistrate judge may decide non-dispositive pretrial matters. FED. R. CIV. P. 72(a); 28
 13 U.S.C. § 636(b)(1)(A). The magistrate judge's order generally operates as a final determination.
 14 LR IB 1–3. But if a party timely objects to the magistrate judge's order, a district court judge
 15 must review the order and "set aside any part [...] that is clearly erroneous or is contrary to law."
 16 FED. R. CIV. P. 72(a); 28 U.S.C. § 636(b)(1)(A); LR IB 3–1(a). "Clear error occurs when 'the
 17 reviewing court on the entire record is left with the definite and firm conviction that a mistake
 18 has been committed.'" *Smith v. Clark Cty. Sch. Dist.*, 727 F.3d 950, 950 (9th Cir. 2013) (quoting
 19 *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948)). "An order is contrary to law when it
 20 fails to apply or misapplies relevant statutes, case law, or rules of procedure." *Jadwin v. Cty. of*
 21 *Kern*, 767 F. Supp. 2d 1069, 1110-11 (E.D. Cal. 2011) (quoting *DeFazio v. Wallis*, 459 F. Supp.
 22 2d 159, 163 (E.D.N.Y. 2006)). In reviewing the order, the court applies the deferential abuse-of-
 23 discretion standard; the magistrate judge's order will be reversed only if the magistrate judge
 24 abused her broad discretion. *Columbia Pictures, Inc. v. Bunnell*, 245 F.R.D. 443, 446 (C.D. Cal.
 25 2007); *see also Premium Serv. Corp. v. Sperry & Hutchinson Co.*, 511 F.2d 225, 229 (9th Cir.
 26 1975) (holding a judge abuses her discretion only when her decision is contrary to law or clear
 27 error based on the evidence).

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1 **III. DISCUSSION**

2 **A. The Court overrules Guerra's objections to Judge Baldwin's orders.**

3 Guerra raises three objections to Judge Baldwin's orders related to discovery disputes
 4 between the parties: (1) Judge Baldwin erroneously granted Dematic's motion to strike Dr.
 5 Bantum's expert report by ignoring the relevant timeline of events; (2) Judge Baldwin
 6 erroneously denied her motion to compel Dematic's employment advertisements between 1998-
 7 2000 by disregarding their relevance to the case; and (3) Judge Baldwin erroneously denied her
 8 motion for sanctions, or in the alternative, a motion to compel as to ESI discovery by finding that
 9 it concerned irrelevant information about gates different from the subject gate. Each objection is
 10 addressed in turn.

11 1. Dr. Bantum's Supplemental Expert Report

12 Under the Federal Rules of Civil Procedure, the initial disclosures of expert opinions are
 13 conducted in accordance with the timeframe set by a scheduling order or, if no order is entered,
 14 pursuant to the time frame stated in the Rules. FED. R. CIV. P. 26(a)(2)(B). The Rules require the
 15 initial disclosure of an expert's opinion to be "a complete statement of all opinions the witness
 16 will express and the basis and reasons for them. FED. R. CIV. P. 26(a)(2)(B)(i). The initial
 17 disclosures must be made on information that is reasonably available to the party, FED. R. CIV. P.
 18 26(a)(1)(E), and a party may supplement its initial disclosure if "the party learns that in some
 19 material respect the [initial] disclosure or response is incomplete or incorrect, and if the
 20 additional or corrective information has not otherwise been made known to the other parties
 21 during the discovery process..." FED. R. CIV. P. 26(e)

22 It is with these foregoing concepts in mind that "courts must apply the Rules with an eye
 23 toward 'common sense,' keeping in mind the purposes that the Rules are intended to
 24 accomplish." *Silvangi v. Wal-Mart Stores, Inc.*, 320 F.R.D. 237, 240 (D. Nev. 2017) (citing
 25 *Jackson v. United Artists Theatre Circuit, Inc.*, 278 F.R.D. 586, 592 (D. Nev. 2011)). That is, the
 26 Rules ensure that parties are on notice of the factual and legal contentions of the opposing side.
 27 *Id.* (citing *Ollier v. Sweetwater Union High School Dist.*, 768 F.3d 843, 862–63 (9th Cir. 2014)).
 28 Importantly, whether or not a supplemental disclosure to the initial disclosure is considered

1 “reasonable” is based on when the information was available to the disclosing party. *Id.* at 241
2 (citing *American Gen. Life Ins. Co. v. Vistana Condo. Owners Assoc.*, Case No. 2:12-cv-01324-
3 JAD-NJK, 2016 U.S. Dist. LEXIS 54141 (D. Nev. Apr. 21, 2016)); *see also Keener v. United*
4 *States*, 181 F.R.D. 639, 640 (D. Mont. 1998) (“[s]upplementation under the Rules means
5 correcting inaccuracies, or filling the interstices of an incomplete report based on information
6 that was not available at the time of the initial disclosure.”).

7 Accordingly, here, the inquiry becomes whether or not it was reasonable for Guerra to
8 wait to disclose Dr. Bantum’s expert report until after the August 13, 2021 initial expert report
9 deadline. Guerra maintains that Judge Baldwin ignored the relevant factual timeline when the
10 court found that “it is clear [Dr. Bantum] had the information available to [offer an opinion as to
11 causation by no later than August 13, 2021],” and that Dr. Bantum’s supplement “did not address
12 errors or new information but instead sought to add information that should have been included
13 in an initial report [on August 13, 2021].” ECF No. 144 at 5. Guerra argues that Dr. Bantum did
14 not have sufficient information to offer an opinion linking her left shoulder injury with the
15 original injury until after the initial expert report deadline. Specifically, after injuring her left
16 shoulder on May 27, 2021, Guerra allegedly could not obtain an MRI on her left shoulder until
17 July 30, 2021 and subsequently received the MRI results on August 16, 2021—three days after
18 the initial expert disclosure deadline. ECF No. 144 at 6. Furthermore, after receiving the MRI
19 records, Dr. Bantum reportedly needed to review all of the accident reports from Sally Beauty
20 and a diagnostic work up from an orthopedic physician, Dr. Dobbs, before he could form an
21 opinion as to causation. *Id.* at 7–8. According to Guerra, this timeline of events justifies an 88
22 day delay in disclosing Dr. Bantum’s expert report to Dematic.

23 The Court is not convinced. As Judge Baldwin made clear in her order on the motion to
24 strike, Guerra should have disclosed Dr. Bantum’s initial opinions related to the causation of the
25 left shoulder injury on or before the August 13, 2021 deadline. ECF No. 140. In his report, Dr.
26 Bantum referenced several documents that were available to him before August 13, 2021
27 deadline. ECF No. 117-2. Specifically, Dr. Bantum referenced: (1) Guerra’s September 24, 2020
28 and October 2, 2020 depositions; (2) Guerra’s June 1, 2021 reporting of the May 27, 2021 injury;

1 and (3) Dr. Jarvis's treatment records and physical therapy notes, dated June 1, 2021 though June
 2 10, 2021. *Id.* at 13–15. Moreover, Guerra's counsel knew, before the August 13, 2021, deadline,
 3 that Guerra's MRI records were on the way as he had already requested them from Reno
 4 Diagnostic Center on August 4, 2021. ECF No. 144 at 7. Dr. Bantum could have rightfully made
 5 a note in his initial expert report disclosure that the report was incomplete until he supplemented
 6 it with the MRI records and Dr. Dobb's diagnostic work up. *See Keener* 181 F.R.D. at 640. With
 7 this timeline of events in mind, the Court finds that Judge Baldwin did not abuse her discretion
 8 when she found that Dr. Bantum's initial opinions on causation were untimely disclosed.⁴
 9 Accordingly, the Court will overrule Guerra's objection to Judge Baldwin's order granting
 10 Dematic's motion to strike Dr. Bantum's expert reports.

11 2. Employment Advertisements

12 To be discoverable, "[p]arties may obtain discovery regarding any nonprivileged matter
 13 that is relevant to any party's claim or defense..." FED. R. CIV. P. 26(b)(1). The relevance
 14 standard is one that is necessarily broad in scope so as to "encompass any matter that bears on, or
 15 that reasonably could lead to other matter that could bear on, any issue that is or may be in the
 16 case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (citing *Hickman v. Taylor*,
 17 329 U.S. 495, 501 (1947)). However, relevancy is not without "ultimate and necessary
 18 boundaries." *Hickman*, 329 U.S. at 507. Thus, Courts have broad discretion to determine
 19 relevancy for discovery purposes.

20 Here, Guerra objects to Judge Baldwin's denial of Guerra's request for documents for
 21 advertisements for employment at Dematic's warehouses from 1998-2000, which include a
 22 description of the physical demands of the job, such as advertisements that mention the work
 23 may involve lifting up to 50 lbs. of weight. ECF No. 141 at 4–5. Judge Baldwin found that this
 24 request was irrelevant as it did not involve the gate at issue in Guerra's claims, specifically the
 25 Model 300 gate. *Id.* Guerra's objection is premised on the erroneous assumption that
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27 ⁴ Despite Guerra's framing to the contrary, Dematic was prejudiced by the untimely disclosure. While Dematic did
 28 have an expert, Dr. Serfustini, that made an initial assessment that the May 2021 injury was not related to the June
 2016 injury, Dr. Serfustini had no opportunity to rebut Dr. Bantum's opinions as they were disclosed after the
 rebuttal disclosure deadline on September 10, 2021.

1 advertisements regarding Dematic's warehouses between 1998-2000, and the weight
 2 requirements to work there, have bearing on her June 2016 injury at Sally Beauty's warehouse in
 3 Reno, NV. Judge Baldwin correctly found that the request involved irrelevant information
 4 involving warehouses not at issue to Guerra's claims as they did not involve the Model 300 gate.
 5 Accordingly, Judge Baldwin's denial as to Guerra's discovery requests regarding Dematic's
 6 employment advertisements between 1998-2000 was not clearly erroneous or contrary to law and
 7 the Court overrules Guerra's objection to Judge Baldwin's order denying her motion to compel.
 8 *See Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) (a discovery request must be "'relevant to
 9 the subject matter involved in the pending action' or 'reasonably calculated to lead to the
 10 discovery of admissible evidence'") (quoting FED. R. CIV. P. 26(b)(1)).

11 3. ESI Discovery

12 As noted, "[p]arties may obtain discovery regarding any nonprivileged matter that is
 13 relevant to any party's claim or defense..." FED. R. CIV. P. 26(b)(1). To that end, Dematic
 14 maintains that Guerra's ESI discovery requests in the Microsoft 365 system were overbroad and
 15 sought information on gate models that were irrelevant to the case at hand. Judge Baldwin agreed
 16 in her order denying Guerra's motion for sanctions, or in the alternative, motion to compel. ECF
 17 No. 141 at 6 ("...the Court finds that information about gates different from the subject gate is
 18 irrelevant to the claims and defenses in this case.") In her objection, Guerra argues that injuries
 19 occurring from those other gate models are relevant as they may show a "substantial similarity"
 20 between her injury and other injuries occurring from Dematic's products.

21 The legal principle of "substantial similarity" provides that "[a] showing of substantial
 22 similarity is required when a plaintiff attempts to introduce evidence of other accidents as direct
 23 proof of negligence, a design defect, or notice of the defect." *Cooper v. Firestone Tire & Rubber*
 24 *Co.*, 945 F.2d 1103, 1105 (9th Cir. 1991). And it has been "uniformly recognized that where
 25 similarity of facts and conditions between prior accidents and the accident in question is not
 26 present, 'the probative value of such prior accident evidence will, in most circumstances, be
 27 outweighed by its prejudicial or misleading nature.'" *Dantzler v. S P Park, Inc.*, Case No. No. 87-
 28 4434, 1989 U.S. Dist. LEXIS 9794, *9 (E.D. Pa. Aug. 21, 1989).

1 Although Guerra refers to this legal principle, upon a review of the written discovery and
2 depositions, no evidence exists of any injury involving the same Model 300 gate at issue in this
3 case. Instead, Guerra found a customer complaint involving an HK Systems gate which has no
4 relation to the Model 300 gate. ECF No. 188-2. As such, Judge Baldwin correctly found that
5 Dematic's Microsoft 365 search results, totaling in 46,354–77 items, were irrelevant to the
6 instant claims. ECF No. 141 at 6. Accordingly, Judge Baldwin's denial as to Guerra's discovery
7 requests pertaining to ESI discovery was not clearly erroneous or contrary to law, and in fact,
8 conforms with the principle that only "substantially similar accidents" are relevant. The Court
9 overrules Guerra's objection to Judge Baldwin's order denying her motion for sanctions, or in
10 the alternative, motion to compel.

11 **IV. CONCLUSION**

12 IT IS THEREFORE ORDERED that Guerra's objections (ECF Nos. 144, 151) to Judge
13 Baldwin's orders are **OVERRULED**.

14 IT IS SO ORDERED.

15 DATED this 15th day of July, 2022.

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LARRY R. HICKS
UNITED STATES DISTRICT JUDGE